No. 3690

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE U. HIND and JAMES ROLPH, JR.,
Plaintiffs in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY
(a corporation),
Defendant in Error.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

ANDROS & HENGSTLER,
Attorneys for Plaintiffs in Error.

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I. FALLACY IN DEFENDANT'S ARGUMENT AS TO DAMAGES. THERE IS A PRIMA FACIE CASE OF LOSS AND DAMAGE.

1. It is important to note that the message was sent on *February* 25, 1916, and that the premium on the war risk, amounting to $6970.54, was paid eight months later, viz., on October 24, 1916.

During the intervening eight months the European war was raging, with the attendant submarine and other sea perils, and the price of war risk insurance varied and fluctuated with the uncertain

events of the war at sea. No one could foretell today what the premium on a war risk would be tomorrow.

Defendant's argument rests largely upon the fallacious assumption that this premium, to be paid in the future, was, on February 25, 1916, a fixed quantity known to be the sum of $6970, whereas, in truth, the uncertainty on which business men had to take their chances was that it might eventually be one-fourth, or twice, or any other fraction or multiple of that amount.

Defendant's fallacious assumption appears at the very beginning of the Brief, on page 2. Speaking of an offer of February 24th by Green & Co., respondent states:

> "This offer, if accepted, would have yielded plaintiffs $229,180 gross or $222,210 net, after paying the war risk of $6970."

Plaintiffs could not possibly know, in February, what the war risk would be in October or whether the offer of February 24th would yield them a net receipt of $222,210, or of $228,000, or any other sum less than $229,180. As long as war risk was chargeable to them, their figuring on a business transaction remained highly speculative. If they, as merchants, desired to eliminate this uncertainty, they would naturally insist upon a price-offer which would transfer the uncertain element to the shoulders of the buyer. It was also natural to assume that the buyer in England would have the better facilities for watching the changing fortunes of naval warfare

and would, therefore, be better fitted to speculate on this particular element of the price.

2. To show that plaintiffs suffered no injury, defendant contends (without citing any authorities for the contention) that

> "The measure of damage is the difference between the price at which they sold and the price which they could have obtained for the barley, had they not been misled by the message. But it is admitted that they received *the highest market price.*" (Brief, p. 5.)

Defendant is mistaken; for it is NOT ADMITTED that plaintiffs received the highest market price; the contrary is STIPULATED, viz., "that there was NO PARTICULAR MARKET PRICE for Superior Barley on or about the 25th February, 1916" (Transcript, p. 27). It was an extraordinary time, a time when a seller of grain could put his own price on his goods. It is, therefore, impossible to predicate the measure of damages on the market price.

The rule to be applied to property having no market value is fixed, in California, by section 3333 of the Civil Code as *the amount which would compensate the owner for all detriment proximately caused thereby, whether it could have been anticipated or not.* This is substantially the general rule laid down in the *Esteve Bros.* case, 268 Fed. 22, discussed in our Opening Brief, on page 6, and confirmed by the cases cited on pages 15-17 of said Brief.

The citation from *Jones on Telegraph and Telephone Companies* (our Brief 15) shows that the measure of damages is "the difference between the price the property actually sold for *and that which he thought he was getting for it*". It would perhaps be more accurate to substitute for the words last cited: "and that which *defendant wrongfully induced him to think* he was getting for it"; at any rate the principle, in this modified and limited form, is sufficient for plaintiffs' contention.

It may be understood, therefore, that our contention is not, as defendant claims, that plaintiffs were entitled to recover on the broad basis of what "he thought he was going to receive" (defendant's Brief, p. 7), but we contend that plaintiffs are entitled to recover on the basis of what they *had a legal right to think* they were going to receive, as a result of defendant's representations. Defendant told them falsely: You are going to receive this specific sum; but in truth they received a lesser sum; the difference between these two sums is plaintiffs' actual, certain, definite positive loss.

Defendant argues that the case of *Reed v. Western Union*, cited in our Brief, is in fact authority for defendant, relying for this argument upon a reference to "the actual market value of the lot". But how could this be, in view of the stipulation that there was no particular market price?

Micklewait v. Western Union Tel. Co., 84 N. W. 1038, is cited as "a case in all respects like the pres-

ent one" (Brief, p. 9). It is clearly distinguishable. In that case plaintiffs were *directed* by the sender of the message to *buy* corn for him at 20½ cents. Plaintiffs did so and made a profit. The telegraph company, in transmitting the message, had erroneously changed the figures 20½ into 21½, but the error had no effect, as plaintiffs had still succeeded in making a profit on the transaction. To make a profit was their object, and they would undoubtedly have bought the corn on the prospect of making any profit, even a profit of $73 instead of $255. They would have done exactly what they did do, error or no error in the telegram. That is why the court said:

> "The mistake in the message caused them no loss of profits; for if it had been correctly transmitted, they would have been in the same situation they now are."

In the instant case, per contra, plaintiffs, if the message had been correctly transmitted, would not have been in the same position in which they now are, but would have saved their $6970. Their object was not to make whatever profit they could in buying goods for an English merchant, but to save a specific, identical expense. It is a fact in the case that *plaintiffs would not have shipped but for defendant's misrepresentation.* Defendant is mistaken (as we have shown, and will show further) in the statement that, what plaintiffs expected to receive

> "was $2450 more than they offered to sell for, and more than the offer which the buyers had declined." (Brief, p. 10.)

What plaintiffs had a right to expect to receive was $6970 more than what they did receive; the loss was the proximate result of the false message.

Western Union Tel. Co. v. Hall, 124 U. S. 444 (Brief, p. 10), is a very different case from the instant case. There plaintiff sued for damages on the ground that he MIGHT have made a profit IF he had sold on November 10th, "the sale on that day being purely contingent, without anything to show that it was even probable or intended, much less that it would certainly have taken place". This is quite different from the instant case, where plaintiffs *did* make a definite payment of $6970, because they *did* sell as the result of defendant's misrepresentation.

Western Union Tel. Co. v. Waxelbaum, 113 Ga. 1017 (Brief, p. 11). This case also is easily distinguishable: The plaintiff, on account of a false telegram, had to pay 1¢ more for eggs than he expected. The eggs were bought for sale; his profits or damages depended upon what he realized from such sale. But there was no proof as to how many were sold, or at what prices; in other words, there was a total absence of proof of damage. In the instant case the damage is the proximate loss of plaintiffs in the amount of the war risk premium.

Acheson v. Western Union Tel. Co., 96 Cal. 641 (Brief, pp. 11-12) is likewise easily distinguishable: The Supreme Court reversed a judgment by default on two distinct grounds: First, that the complaint

stated no cause of action; second, that the complaint *failed to show any special damage.* The court said:

> "The gist of the action is for the recovery of special damages, and there is no allegation of special damage * * * If plaintiff suffered special damage by the *failure to purchase certain hops,* there should have been averments under which evidence of such special damage, and the facts upon which it rested, could have been introduced."

There is an obvious distinction between a case where a party *might* have made a profit *if* he had bought goods and *if* he had thereafter sold them, and the instant case, where an actual *sale* was made, being induced by defendant's deception and followed by an immediate and definite loss; there is also a distinction between a case where no special damage is averred or proved, and the instant case where the specific and definite loss of $6970 is shown as the proximate result of defendant's misrepresentation.

Plaintiffs have established a prima facie case of loss and damage. Defendant's argument that eventually this *might* not have been a loss, but a gain, is no defense. If defendant could show that the sale of the barley *would* not, eventually, be a detriment, this would be a defense; but the burden of showing that later profits made up for the prima facie loss is upon defendant, and defendant has made no such showing.

II. REPLY TO ARGUMENT THAT PLAINTIFFS ARE BARRED BY CONTRIBUTORY NEGLIGENCE.

Defendant argues that plaintiffs had no right to act upon the message because they had reasonable grounds to suspect that the message was untrue. The alleged grounds were that the message contained an offer for $2456 more than the plaintiffs had asked, and plaintiffs should therefore have known that there was something wrong.

The conclusive answer to this argument is that the message did NOT contain an offer for $2456 more, or any other sum greater, than the plaintiffs had asked.

Defendant bases its argument upon "mathematics" which, it says, "cannot be denied" (Brief, p. 14).

However, it is easy to demonstrate mathematically the fallacy of respondent's mathematics. It lies in line 8 of page 14 of respondent's Brief, reading:

"Less war risk (to be paid by sellers) $6970."

This assumes that $6970 was the premium on February 25th, and was an immutable sum between that date and the date in October when it was paid by plaintiffs. The assumption is unwarranted. This sum was, during the exciting events of the war, subject to daily variation; in the event that the submarine perils were successfully overcome, it would diminish indefinitely. The evidence does not show, what the premium was on February 25th. Assuming that, by the time the La Rochejaquelin should sail, the sum would be $3485 (one-half the sum used

by respondent for its erroneous calculation), the arithmetic on page 14 would be:

"Sellers offer net $225,695.
15,105 quarters at $14.87½ equals 224,686."

On this assumption, therefore, the message, as delivered, offered to plaintiffs one thousand dollars *less* for their barley than they had asked, and this deficiency would be increased in proportion as the rate of premium would decrease.

The natural course to be followed by a conservative merchant, on February 25th, was to eliminate the uncertainty of this highly speculative element by transferring the risk to the buyer. This is what plaintiffs did by fixing a definite price for their goods, which would not be affected or qualified by subsequent fluctuations.

III. REPLY TO RESPONDENT'S ARGUMENT AS TO LIMITED LIABILITY.

The agreement signed by F. G. Green & Co., on the face of the message blank, requests the telegram to be forwarded to plaintiffs, subject to the "CONDITIONS" printed on the back.

There are on the back two sets of "conditions", headed:

> (*First Set*): "Conditions on which this telegram is accepted if it be handed in at an office of the Western Union Telegraph-Cable System." (Transcript p. 35.)

> (*Second Set*): "Conditions on which this telegram is accepted by the postmaster-general if it be handed in at a public telegraph office in the United Kingdom." (Transcript p. 36.)

The second set of "conditions" has no application to this telegram.

The first set of "conditions" applies, but there are, among these conditions, none that refer to repeated messages, or unrepeated messages, or any distinction between repeated and unrepeated messages. The only "condition" that could, with any plausibility, be claimed to be applicable to the facts of the instant case, is the following:

> "The company shall not be liable to make compensation, beyond the amount to be refunded as above (viz.: the charges paid by the sender for the telegram), for any loss, injury or damage arising or resulting from * * * error in the transmission or delivery thereof, *howsoever such error shall have occurred.*" (Transcript p. 36.)

Defendant recites (Brief, p. 19), that among the "*conditions*" referred to, on the face of the message, is the following: "All important telegrams should be repeated, for which an additional quarter rate is charged". By an accident which favors defendant, this clause is printed, in defendant's Brief (page 19, paragraph before the last), in conjunction with the "conditions" referred to in the last paragraph of said page. But the last paragraph on page 19 should obviously be the first paragraph on page 20 and refers only to what follows, and

not to what precedes. An inspection of the back of the cablegram (in the custody of this court) shows conclusively that no such "condition" exists. The clause referred to, although printed on the back, is no more a "condition" of the contract than is the clause that "the public are recommended to hand in their telegrams at the Company's Stations", or the clause that "the forms upon which telegrams are written should be marked Via Western Union, Via Anglo, or Via Direct". All these clauses are recommendations, but are expressly distinguished from "conditions" by the fact that the clauses which are intended to be conditions are expressly headed as such. (Transcript, pages 34, 35, 36.)

Defendant argues (Brief, p. 20), that

> "By the terms of the contract defendant was not to be held liable for error beyond the amount paid for the transmission."

Indeed, if the clause referred to were binding, this would apply to any error, "howsoever such error shall have occurred", and to "*any* loss or damage resulting from error", whether the message was repeated or unrepeated, or whether the negligence causing the error was slight or gross, or whether the error was caused by wilful misconduct.

Such a stipulation is *void, as against public policy,* in so far as it would relieve the company from liability for want of the high degree of care and diligence required by law. The burden is on the company to show that there was no want of due care and diligence. The evidence is not only in-

sufficient to show that the company exercised due care and diligence, but the facts disclose strong evidence of gross negligence, if not wilful misconduct.

Western Union Tel. Co. v. Cook, 61 Fed. 624 (decided by this court).

The cases cited on page 21 of defendant's Brief have no bearing on the instant case; for, as defendant says, "in all those cases the *validity of the stipulations relating to unrepeated messages*" was involved and affirmed. In the instant case, however, there is NO STIPULATION relating to unrepeated messages; there is no classification into or distinction between repeated and unrepeated messages; they are treated all alike by the company, and the contract which defendant made with the plaintiffs notifies them in advance that the same limitation of liability shall apply in the event of any error in the transmission, "howsoever such error shall have occurred".

Esteve Brothers Case.

Defendant relies upon this case, decided by the Supreme Court since the decision of the instant case by the District Court.

1. In the *Esteve* case there was no written contract between the parties; in the instant case the rights of the parties are defined by a written contract. The only conditions binding upon plaintiffs are the "conditions" expressly subscribed to by the sender of the message, and among these there

is none based upon the distinction between repeated and unrepeated messages; on the contrary, all distinction is impliedly abolished.

2. In the *Esteve* case the *repeated* rate *offered to the sender greater liability in case of error;* in case of error in a repeated message the liability was agreed to be far greater than in case of error in an unrepeated message. The existence of this fact is the raison d'être of that case. In the instant case, on the other hand, this fact is absent. The sender was given express notice that the company would not be liable beyond the charges paid by the sender for *any* damage arising from error in the transmission, *however* it shall have occurred.

In effect this "condition" is more than a limitation of liability, applicable to a particular condition; it is a categorical declaration that there shall be no liability for error in the transmission under any circumstances (*Jacobs v. Western Union Tel. Co.,* 196 S. W. 31).

Would not an intelligent sender reading such a condition come to the conclusion that there would be no use to repeat the message, as, *so far as the liability of the company is concerned,* he would not be protected against damages by repetition?

The fact that defendant had, in its general business, established a classification between repeated and unrepeated messages, does not aid defendant in this case; for it had neither brought this classification home to plaintiffs, expressly, nor permitted

it to be brought home to them, impliedly, as a matter of law.

In *Union Construction Company v. Western Union Tel. Co.,* 163 Cal. 299, there is an illustration of the clauses used on defendant's blanks, where it intends to rely upon repetition of the message for the purpose of limiting its liability, they read:

> "It is *agreed* * * * that said company shall not be liable for mistakes * * * in transmission * * * of any *unrepeated* message, beyond the amount received for sending the same; nor for any mistakes * * * in the delivery of any *repeated* message, beyond fifty times the sum received for sending the same, unless specially insured. * * * Correctness in the transmission of a message * * * can be insured by contract in writing * * *."

There is no such clause, or clause having a similar effect, in the instant case.

In the *Esteve* case the distinction between liability for error in repeated messages and liability for error in unrepeated messages was brought home to the plaintiff as a matter of law.

But in the instant case the distinction is twice abolished by the contract:

First: by the sender of the message agreeing that his contract shall be subject to the conditions printed on the back (and no other conditions);

Second: by the company insisting upon the same limitation of its liability, whether it arises from error in a repeated, or an unrepeated message,

and thus placing substantially the risk of error, involved in transmitting the message, upon the plaintiffs.

Defendant's attempt to take the instant case out of the rule of *Union Pacific R. R. Co. v. Burke,* Advance Opinions p. 318, must fail; for, in the case before this court, no offer was made to the sender of a rate under which the company would assume *any substantial,* much less *full* liability for all losses suffered through the fault of the company. It may have offered alternative rates for repeated and for unrepeated cable messages; but it stipulated, at the same time, that *its liability for error* should be the same in either case. The repeated rate did not, as it did in the *Esteve* case, offer "greater liability in case of error".

In all the cases cited by defendant the company said to the sender: I will indemnify you for any, or at least the substantial, damage resulting from my negligence if you repeat the message and pay me an additional compensation.

In the instant case, however, the liability of the defendant company is not affected by any clauses with relation to unrepeated and specially valued messages. In fact there is no condition making the distinction. The recommendation that "all important telegrams should be repeated, for which an additional quarter rate is charged" is *not* a condition; even if it were a condition, the distinction between a repeated, and an unrepeated, message is

contractually wiped out by the clause that, in either case, the liability of the company shall be the same, viz.: a liability of no substance whatever.

All of the authorities cited by defendant, and its argument, being founded upon the presence of unrepeated-message stipulations of liability, and there being clearly no such stipulation in the instant contract, the authorities and the argument have no application to the instant case.

If the language of the contract admitted of any doubt, it would be resolved in plaintiff's favor:

> "These contracts are prepared by the telegraph company and printed upon all of its blanks provided for the use of the public. They are not often the result of negotiation between the parties. The sender has no choice, nor any reasonable opportunity, to make terms not specified in the printed contract. * * * Hence, *if it is uncertain in any particular, its language on that point is to be interpreted most strongly against the company.*"
>
> Shaw, J., in *Union Construction Co. v. Western Union Tel. Co.*, 163 Cal. 299.

The instant "condition" comes within the language used in the case of *Jacobs v. Western Union Tel. Co.*, 196 S. W. 31:

> "A stipulation by such a company that its liability is limited merely to the amount received for sending the message is *not a limitation of liability,* but is a *declaration that there is no liability,* since the sum paid would be due to the sender, by reason of the unperformed service, without such stipulation. The so-called agreement is nothing more than a claim of one-sided

right to wrongfully fail to perform the contract without being responsible for any damage occasioned by the wrong. It may be such a stipulation would be good where the failure of the company is unavoidable; but to assert an unqualified release from all liability save to refund the charge collected for the unperformed service is, in effect, to claim non-liability for negligence."

IV. DEFENDANT IS CHARGEABLE WITH GROSS NEGLIGENCE, IF NOT WILFUL MISCONDUCT.

1. The cause of the damage to plaintiffs was more than an "*error* in transmission" of the message.

If the principle of strict construction be applied, it would be proper to hold that an "error" falls short of *any* negligence; for negligence connotes blameworthiness, whereas "error" does not. From this it would follow that the "condition" purporting to exempt defendant from liability for "error" does not reach a case in which the condition of the message as delivered shows *admitted negligence.*

> "Fault imports blame; error may arise from ignorance or mistake alone."
>
> *The Manitoba,* 104 Fed. at 154.

We contend that this negligence amounted to at least *gross negligence,* if not to wilful misconduct.

2. Defendant says that this contention "is answered by the decision of the Supreme Court in the *Esteve Bros.* case" (Brief, p. 30); but this is

clearly a mistaken view of that case, which is predicated upon "absence of wilful misconduct or gross negligence" (Adv. Op. 1920-21, p. 654). We shall hereafter show the distinction between the "errors" in the two cases and show that the error in the instant case *was* greater than in the *Esteve* case.

Defendant is also clearly wrong in the statement that "gross negligence arises where there is evidence of wilful misconduct or intentional wrong". The courts (including the Supreme Court) would not uniformly speak of "wilful misconduct OR gross negligence", if there were no distinction between these two faults. "Gross negligence" connotes a negative mental attitude, whereas "wilful misconduct" or "intentional wrong" connotes a positive attitude. Defendant is liable under the cases, even though the tort shown is less than an intentional wrong.

3. If the sender of a telegram hands to the company, as was done in this case, a message containing 30 words, it may well be that the changing of one of these 30 words, or dropping a word out of the message, is negligence of the ordinary kind; but where the company reaches out of the message and inserts a new and additional word into it, it is not only grossly negligent, but exercises its will positively, so as to come within the scope of the word "wilful". This applies with particular force to the instant case where defendant picked the most fateful of all words, the word *"not"*, and added

it to the message, thereby changing its meaning into the exact opposite. In the nature of things the handling of this particular word—so fraught with danger if misused—calls for the greatest care on the part of the Telegraph Company; any negligence connected with the application of the word "not", on the part of a carrier of messages, should be considered gross negligence per se. The act of *adding* the word to the message and thereby reversing its meaning is not only gross negligence per se, but raises a presumption of wilful misconduct. It is certainly a typical example of "the exercise of so slight a degree of care as to justify the belief that there was indifference as to the interest and welfare of others" (*Redington v. Pacific Postal Co.,* 107 Cal. 567). We contend that the facts are more than sufficient to constitute a prima facie case of gross negligence on the part of defendant.

4. It may be admitted that ordinarily wilful misconduct or gross negligence are not to be presumed from the mere fact of a mistake; but in the instant case the conclusion or inference of wilful misconduct or gross negligence is warranted. In most cases, and in particular in the cases cited by defendant, the question is as to the *quantity* offered in the false telegram received (whether more or less than the quantity actually offered); but in the instant case the question is as to the existence or non-existence of an element of the proposed contract, nay more, the *false assertion of the direct opposite*

of the truth. The burden of proving an excuse for this flagrant wrong and of reducing it from its prima facie character of gross negligence, is upon defendant. Indeed, plaintiffs *could not possibly* show, how, or why, "in transmitting said message over said land-line, defendant inserted the word 'not' between the words 'Ipswich' and 'including'." On the other hand, defendant has the easy and obvious means of showing the facts. If defendant was grossly negligent in employing incompetent, inexperienced or reckless operators, plaintiffs could not show it, even if they subpoenaed every operator between New York and San Francisco; on the other hand, if defendant employed competent and experienced operators, and had a good excuse for its apparent gross negligence, it would have been easy to show it and would certainly have been shown by the proof.

5. The authorities.

a. *Defendant's authorities:*

The Supreme Court said, in the *Primrose* case, 154 U. S. 1 (Brief, p. 35):

> "By no devise can a body corporate avoid liability for fraud, for wilful wrong, or for the gross negligence which, if it does not intend to occasion injury, is reckless of consequences, and transcends the bounds of right with full knowledge that mischief may ensue."

In that case the mistake consisted in changing the word "bay" to "buy" (or the letter "a" to the letter "u"). It would be difficult to find an illustra-

tion of slighter negligence. On the other hand it would be difficult to find an illustration of so extreme a case of prima facie gross negligence as the instant one.

In the *Esteve Bros.* case the message, as delivered, directed a sale of 2,000 bales of cotton. The message actually sent had directed the sale of 200 bales. The error in the figures is assumed to be a case of ordinary negligence.—This is very different from the instant case, which involves not merely a question of quantity, but a positive statement ~~from~~ that the sender made the opposite offer of the true one.

White v. Western Union, 14 Fed. 710 (Brief p. 32) is another good illustration of slight, or at most ordinary, negligence—the change of the letters "teen" to the letters "ty".

Jones v. Western Union, 18 Fed. 717 (Brief pp. 32-33). The word "Chicago" was changed to the word "cheap". The sender elected to send his message at half-rate, under a contract limiting the liability of the company in such cases. *No question of the degree of negligence is involved.* The passage quoted means that mere proof of a mistake in the message involved is not sufficient evidence of gross negligence, which we admit. This, however, does not apply to the instant case, showing *on the face* not merely a mistake, but negligence of an extreme character, and probably wilful misconduct.

Pegram v. Western Union (Brief, p. 33). The distinction is obvious: The dropping of a part of

a word is very slight as compared with the inserting of so pregnant a word as the word "not". Other distinctions are apparent on the face of the citation of what "the court said".

Western Union v. Neill, 44 Am. Rep. 589 (Brief pp. 33-34). This is another prima facie case of slight negligence, therefore not in point. The negligence shown in the instant case is prima facie gross, if not more.

Kiley v. Western Union (Brief pp. 34-35). Distinction: A failure of a message to reach destination may be caused by gross negligence, or by ordinary negligence of the company; if the latter, it is within the stipulations for limited liability. The *insertion* of the word "not" in the message is prima facie an *active,* positive fault, due to either wilful misconduct or at least gross negligence.

Grinnell v. Western Union (Brief p. 35). Distinction: The "omission of a word from a message" is prima facie ordinary negligence. The insertion of a word in the message (*a fortiori* the word "not") is prima facie gross negligence.

The facts in the instant case show at least such entire want of care, and, in our opinion, such wilful misconduct, as would raise the presumption of a conscious indifference to consequences. With the exercise of ordinary care such a default would be improbable, if not impossible.

b. *Plaintiffs' authorities:*

In *Pegram v. Western Union,* 2 S. E. 256 (cited also by defendant, on page 33 of its Brief) the

court *held,* that *a change in the number of words* of a telegram by *omission* of one word is *gross negligence,* so as to make the company liable.

It is submitted that the *addition* of one word to a telegram is, *at least,* gross negligence; if that word is the word "not", the addition is a wilful, positive act amounting to the "wilful misconduct" referred to in the recent cases in the Supreme Court. The true message in the instant case consists of 30 words; defendant added another word, and if it had searched the dictionary, it could not have found one of a more fatal effect to the interests of plaintiffs than the one word which it added. The words used by His Honor Judge Ross, in *Western Union Tel. Co. v. Cook,* 61 Fed. 624, apply:

> "The evidence strongly tends to show not only that the company *did not use great care* in the transmission of the message, but was *grossly negligent.*"

See also *Western Union Tel. Co. v. Lange,* 248 Fed. 656 (opinion by Hunt, J.).

In *Western Union Tel. Co. v. Goodbar,* 7 So. 214, the delivery of a message consisting originally of nine words, with only seven words in it, was held to be *gross negligence,* for which the company was liable despite the stipulation.

In *Wolfskehl v. Western Union Tel. Co.,* 46 Hun. 542, the *omission* of the word "not" was held negligent rendering the defendant liable.

In *Redington v. Pacific Postal Tel. Co.,* 107 Cal. 317, the Supreme Court of California upheld a

finding that the dropping of the syllable "teen" so as to alter the word "nineteen" to "nine" was gross negligence.

The argument of defendant is based upon the fallacy that evidence of gross negligence requires evidence of wilful misconduct or intentional wrong. Defendant says that "under no theory can it be assumed that an operator would change the message either wilfully or intentionally" (Brief, p. 36). It is not necessary, for the success of plaintiffs' cause, to make such an assumption (although it could have been positively and easily set at rest, had defendant presented evidence to show, how and why its default was made possible). It is sufficient to show that the company was guilty of gross negligence. On this question the principle of *res ipsa loquitur* applies.

We reserve the contention, however, that even if the court should not hold the default of the defendant to amount to gross negligence, the defendant would still be liable to plaintiffs for the damage suffered, by reason of the fact that the contract in suit makes defendant liable for ordinary negligence, as shown under the previous heads of this argument.

Dated, San Francisco,
November 19, 1921.

Respectfully submitted,

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